

CLARK v. FITZGERALD.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 145. Argued December 7, 8, 1907. — Decided May 28, 1898.

The answer given to the fourth question in *Del Monte Mining and Milling Co. v. Last Chance Mining and Milling Co.* ante, 55, compels an affirmance of the judgment below in this case.

THE case was thus stated by the plaintiff in error in his brief.

The plaintiff in error is the owner and in possession of the Black Rock lode mining claim situated in the Summit Valley mining district in Silver Bow County, Montana.

The defendants in error own two thirds interest, and the plaintiff in error one third interest in the Niagara lode mining claim situated in the same district and county. The Niagara lode lies along side of the Black Rock lode so that the south side line of the Niagara forms or is a part of the north side line of the Black Rock lode.

The Black Rock lode is the older of the two locations. As appears from the pleadings in the cause the vein or lode crosses the east end line and south side line of the Niagara lode 513 feet west of the northeast corner of the Black Rock lode and dips to the south and under the surface of the Black Rock lode claim.

The plaintiff in error entered upon that part of the vein, east of the point where it crosses the division side line between the Black Rock and Niagara lode claims and extracted ore

Syllabus.

from the said vein on its dip under the Black Rock lode at the point above described, and which is designated on the diagram as "ore bodies."

Thereupon the defendants in error, who as stated *supra*, own two thirds interest in the Niagara lode claim brought an action asking for an accounting and judgment for two thirds the value of the ore extracted by the plaintiff in error. Judgment was rendered against the plaintiff in error for the sum of \$27,242.54, being two thirds the value of the ore extracted and for the cost of the suit.

An appeal was taken to the Supreme Court of the State and the judgment of the lower court was affirmed.

Mr. Robert B. Smith for plaintiff in error. *Mr. Robert L. Wood* was on his brief.

Mr. James W. Forbis for defendants in error.

MR. JUSTICE BREWER delivered the opinion of the court.

The case is before us on error to the Supreme Court of Montana. It is unnecessary to state its facts in detail, and it is sufficient to say that the answer given to the fourth question in the opinion just filed in *Del Monte Mining Co. v. Last Chance Mining Co.*, *ante*, 55, compels an affirmance of the judgment.

Affirmed.